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No. 05-669

IN THE

Supreme Court of the United States

BP America Production Company *et al.*,
Petitioners,

v.

Rejane Burton, Acting Assistant Secretary,
Land and Minerals Management,
Department of the Interior, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF *AMICI CURIAE* JICARILLA APACHE NATION, SOUTHERN UTE INDIAN TRIBE, STATE OF NEW MEXICO, AND CALIFORNIA OFFICE OF THE STATE CONTROLLER IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The Jicarilla Apache Nation, Southern Ute Indian Tribe, State of New Mexico, and California Office of the State Controller respectfully submit this brief as *amici curiae* in support of Respondents.[1]

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[1] No counsel for any party authored any portion of this brief and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief. All parties to this case have consented to the filing of this brief, as indicated in letters filed with the Court.

INTEREST OF *AMICI CURIAE*

"States and Indian landowners have an important stake in the full and correct payment of royalties." H.R. Rep. No. 97-859, at 15 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 4269.

The States of California and New Mexico contain federal lands subject to thousands of oil and gas leases. Pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. § 191(a) (2000), the states receive 50% of all royalties generated from these federal leases. This money supports a number of state programs, including schools, Medicaid, and water conservation projects.

The Jicarilla Apache Nation and the Southern Ute Indian Tribe are federally recognized Indian tribes located in northwest New Mexico and southwest Colorado, respectively. The tribes are the lessors and royalty owners of oil and gas leases issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (2000), and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (2000). Royalties paid to the tribes from oil and gas production on these leases provide about half of all the revenue used to pay for essential government services on the tribes' reservations, such as police, tribal courts, health care, and education.

Lessees on Indian and federal lands initially pay royalties based on their own reports of the volume and value of their oil and gas production. *See* 30 C.F.R. part 210 (2005). These reports are subject to audit by the Minerals Management Service ("MMS"), the agency in the Department of the Interior ("Interior") responsible for managing federal and Indian oil and gas royalties. *See, e.g.*, 25 C.F.R. § 211.6; 30 C.F.R. part 210 (2005). In numerous instances, the MMS has issued orders to pay additional royalties to companies producing oil and gas

from the Jicarilla Apache and Southern Ute Reservations and from the *amici* States. Because of the complexity and retroactive nature of the audit process, many of these orders to pay involve periods that stretch back more than six years from the date of the orders. Application of the six-year statute of limitations in 28 U.S.C. § 2415(a) (2000) to these orders, as Petitioner BP America ("BP") urges, would render the amounts due to the tribes and states uncollectible. It also would result in a windfall to the oil and gas companies, who would in effect be rewarded for underreporting the amount of royalties they owed.[2]

SUMMARY OF ARGUMENT

As the government has argued and *amici* agree, Congress spoke clearly in the Act of July 18, 1966, as amended, 28 U.S.C. § 2415(a), and provided a statute of limitations against the United States for judicial actions, not for administrative orders. Subsequent amendments to Section 2415(a) to preserve Indian contract claims confirm that Congress did not intend the six-year statute of limitations to apply to administrative orders. The statutory language, legislative history, and administrative actions regarding Indian contract claims all demonstrate that Section 2415(a) applies only to "litigation" and "suits" brought by the United States in "court."

Congress confirmed this interpretation of the statute as regards royalty management when it enacted subsequent legislation in that specific field. The text and legislative history

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[2] Atlantic Richfield Company, the second petitioner in this case, did not raise the statute of limitations below and in any event is wholly owned by BP. Pet. Br. at iii. This brief therefore references only "BP" or "Petitioner" in the singular.

of the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), Pub. L. No. 97-451, 96 Stat. 2447 (1983), codified at 30 U.S.C. §§ 1701-1757 (2000), and the amendments to FOGRMA in the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 ("RSFA"), Pub. L. No. 104-185, 110 Stat. 1700 (1996), demonstrate that Congress did not intend Section 2415(a) to apply to MMS orders for royalty payment.

Congress enacted FOGRMA in 1983 in order to address a problem dating back to the 1960's involving massive underpayments of federal and Indian oil and gas royalties. To remedy the problem, Congress prescribed more comprehensive audits by MMS of industry reports and payments of royalties, a goal that does not at all support an intent to limit the time for conducting those administrative audits.

In RSFA, enacted another 14 years later, Congress imposed a seven-year statute of limitations against the United States for royalty collections and explicitly applied the limit to both judicial and administrative actions. 30 U.S.C. § 1724. The statutory language and legislative history show that Congress intended to impose a *new* statute of limitations for such administrative actions, not an amendment or revision to Section 2415(a). Congress' intent is particularly evident in its express exemption of Indian lands from this new seven-year statute of limitations. 30 U.S.C. § 1701 note. If Section 2415(a) applied to MMS orders, the Indian exemption in the new law would make administrative orders enforcing tribal oil and gas royalties subject to the *shorter* six-year statute in Section 2415(a), a consequence clearly not contemplated by Congress, especially in light of the federal government's trust responsibility toward tribes.

The fact that Section 2415(a) does not apply to administrative orders for payment of royalties imposes no unfair burdens on oil and gas lessees. The original bargain struck through BP's leases included no statute of limitations on government claims for underpayment of royalties, neither judicial nor administrative. Furthermore, the history of malfeasance in the payment of royalties under federal and Indian oil and gas leases and the resulting Congressional actions strengthening royalty oversight and enforcement through FOGRMA make clear that Congress did not intend a period of repose for orders to pay oil and gas royalties until it passed RSFA in 1996.

Thus, the plain statutory language of Section 2415(a), its subsequent amendments preserving claims regarding Indians, and the language and legislative history of FOGRMA and RSFA all serve to support affirmance of the D.C. Circuit's opinion in this case. To hold otherwise would undermine the role of MMS in enforcing royalty obligations, causing unnecessary litigation and unjustly harming the states and tribes who have relied on MMS oversight.

ARGUMENT

I. The Amendments to Section 2415(a) Extending the Statute of Limitations for Indian Contract Claims Confirm that Section 2415(a) Applies to Judicial, Not Administrative, Actions.

The plain language of Section 2415(a) establishes a six-year statute of limitations for *judicial* actions brought by the United States. Section 2415(a) provides as follows:

> every *action for money damages* brought by the United States . . . which is founded upon any contract . . . shall be barred unless the *complaint* is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable *administrative proceedings* . . . , whichever is later.

(Emphasis added.) Congress used terms in this provision specifically associated with judicial actions, such as "action for money damages," which the D.C. Circuit below noted "points strongly to a suit in a court of law, rather than an agency enforcement order that happens to concern money due under a statutory scheme." *Amoco Production Co. v. Watson*, 410 F.3d 722, 733 (2005) (Pet. App. 16a). Moreover, Section 2415(a) ties the running of the statute of limitations to the filing of a "complaint" and refers to the time when the "right of action accrues," also terms associated with judicial claims. Congress then contrasted this judicial action with *administrative* activity, providing that an "action for money damages" may be brought within one year of a final decision in an administrative proceeding. Congress thus was not creating a statute of limitations for administrative orders, but was concerned about the time for bringing an action in the federal courts.

Amici concur with all of the United States' arguments on these issues – on the express language of the statute, as well as on the rules of statutory construction and the legislative history of Section 2415 – and do not repeat them here to avoid duplication. Instead, *amici* explain how the amendments to Section 2415(a) extending the statute of limitations for Indian contract claims confirm that the statute applies only to judicial, not administrative, claims.

Congress amended Section 2415(a) on several occasions, beginning in 1972 and continuing through 1982, to

extend the time for the United States to bring Indian contract claims, as reflected in the provisos following the main portion of Section 2415(a).[3] BP argues that these provisos somehow demonstrate that Section 2415(a) applies to administrative orders. On the contrary, both the language and the legislative history of the Indian claims amendments confirm that Section 2415(a) applies to judicial actions only.[4]

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[3] *See* An Act to extend for ninety days the time for commencing actions on behalf of an Indian tribe band, or group, Pub. L. No. 92-353, 86 Stat. 499 (1972); An Act to extend the time for commencing actions on behalf of an Indian tribe, band, or group, Pub. L. No. 92-485, 86 Stat. 803 (1972); An Act to amend the statute of limitations provisions in section 2415 of title 28, United States Code, relating to claims by the United States on behalf of Indians, Pub. L. No. 95-64, 91 Stat. 268 (1977); An Act to amend the statute of limitations provisions in section 2415 of title 28, United States Code, relating to the claims by the United States on behalf of Indians, Pub. L. No. 95-103, 91 Stat. 842 (1977); An Act to extend the time for commencing actions on behalf of an Indian tribe, band, or group, or on behalf of an individual Indian whose land is held in trust or restricted status, Pub. L. No. 96-217, 94 Stat. 126 (1980); Indian Claims Limitation Act of 1982, Pub. L. No. 97-364, 96 Stat. 1966 (1982).

[4] The full text of the relevant provisos in Section 2415(a) reads as follows:

> *Provided further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further,* That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by Section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists

(continued...)

First, the language describing the types of actions to which the provisos apply is the same in all relevant particulars as the language in the main part of Section 2415(a), which, as discussed above and argued by the United States, pertains only to judicial actions. The first proviso added by the amendments (allowing an additional 90 days for the United States to bring Indian contract claims) specifies that the statute of limitations applies to an "action for money damages" for which a "complaint" is filed, just as in the main part of subsection (a). The second proviso (which, together with subsection (g), extends the time on which Indian contract claims accrue) also contains this language. Finally, the third proviso contains both this language and also the same distinction as in the main portion of subsection (a) between a "right of action" enforced by a "complaint" and a "final decision . . . rendered in applicable administrative proceedings."

The legislative history of the Indian contract claims amendments supports the plain reading of the amendments and of the identical language in the main body of Section 2415(a) as applying to judicial actions only. The Indian contract claims legislation was enacted because the Department of the Interior was aware that Section 2415(a) imposed a statute of

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[4](...continued)
published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

limitations on "contract *suits* brought by the United States;" Interior stated that it required more time "to identify all of these wrongs and then develop factual information necessary to get *litigation filed*" and that "[t]his inability to *prosecute* the present claims of Indians will work a hardship on tribes." S. Rep. No. 92-1253, at 2-4 (1972); H.R. Rep. No. 92-1267, at 3 (1972) (emphasis added). The reports also refer to "*prosecuting* the claims in the *courts*." S. Rep. No. 92-1253 at 3; H.R. Rep. No. 92-1267 at 4 (emphasis added); *see also* S. Rep. No. 92-1253 at 4, H.R. Rep. No. 92-1267 at 3-7 (other instances referring to "prosecuting" a claim). The legislative history of subsequent amendments is similar. *See, e.g.*, H.R. Rep. No. 95-375, at 3, 7 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1616 (recognizing that Interior must identify and investigate claims before it can refer them to the "Justice Department for *litigation*" and supporting extending the statute of limitations for "*suits* brought by the Government on behalf of Indians" to "afford the Government additional time to . . . prepare for *litigation*") (emphasis added); *accord* H.R. Rep. No. 96-807, at 8, 10 (1980) (supporting the extension "for filing certain *lawsuits* on behalf of Indian individuals or tribes to recover monetary damages" and to address certain "particulars without which *suit* cannot be filed") (emphasis added). The legislative history thus makes clear that the amendments addressed a statute of limitations for judicial actions.

The hearing testimony that Petitioner cites does not warrant any different interpretation. *See Time Extension for Commencing Actions on Behalf of Indians: Hearing on S. 3377 and H.R. 13825 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 92d Cong., 2d Sess. (1972) (joint statement of Arthur Lazarus, Jr., Marvin Sonosky, and Charles A. Hobbs, Attorneys' Panel). The reference to "violations of lease agreements" in the testimony

does not necessitate a conclusion that the actions subject to Section 2415(a) include administrative royalty orders; in fact, the testimony specifically states that the claims discussed "are claims that would be filed in the Federal district court." *Id.* at 31; *see also id.* at 37-38 (referring to "suits" throughout, as well as to "litigants").[5]

Finally, Petitioner's reliance on the Federal Register lists published pursuant to the Indian Claims Limitation Act ("ICLA"), Pub. L. No. 97-394, 96 Stat. 1966 (1982), is also misplaced, because these lists also deal with judicial, not administrative, claims. The ICLA, referenced in the second and third provisos added to Section 2415(a), required the Secretary of the Interior to publish a list of all Indian claims identified under the "Statute of Limitations Project" and accruing on or before July 18, 1966, the effective date of Section 2415. ICLA § 3(a). The referenced "Statute of Limitations Project" was established by the 1980 amendments to Section 2415, Pub. L. No. 96-217, and required the Secretary to identify claims appropriate either for *litigation* or legislation.[6] Individual Indians, Indian tribes and other Indian groups then had six months to propose additional claims to be

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[5] The testimony included the following exchange:

> MR. LAZARUS: These are claims that would be filed in Federal district court.
> SENATOR FANNIN: I think that was made plain.

Id. at 31.

[6] Pub. L. No. 96-217, § 1 required the Secretary to commence actions for money damages for pre-1966 Indian claims by filing complaints by December 31, 1982 and, in § 2, required the Secretary to submit legislative proposals to Congress to "resolve those Indian claims subject to . . . the first section of this Act that . . . are not appropriate to resolve by *litigation*" (emphasis added).

considered "for *litigation* or legislation by the United States," and the Secretary was to include these claims on a revised list. ICLA §§ 4(a), 4(c) (emphasis added). The Secretary could "reject for *litigation* any of the claims" contained on the two lists and could submit the claim instead for legislation pursuant to Section 6(a). ICLA § 5(b) (emphasis added). Rejected claims were to be listed in a third Federal Register notice, and "potential individual Indian *plaintiffs*" were required to file a "*complaint*" on such claims within one year of publication. ICLA §§ 5(b), 5(c) (emphasis added). This Congressional language makes clear that the two Federal Register lists cited by Petitioner do not pertain to administrative claims. *See* 48 Fed. Reg. 13,698 (Mar. 31, 1983); 48 Fed. Reg. 51,204 (Nov. 7, 1983).[7]

The text and background of the Indian contract claims amendments therefore support the D.C. Circuit's opinion that Section 2415(a) limits only judicial actions, not administrative orders. Subsequent legislation pertaining to oil and gas royalty collection provides even further support.

II. Congress Demonstrated Through FOGRMA and RSFA that Section 2415(a) Does Not Apply to MMS Orders to Pay Royalties.

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[7] Nor do the third and other subsequent lists published by Interior in the Federal Register pertain to administrative claims. Those lists each refer to the relevant time limit for filing a "complaint" on "any right of action on any claim appearing on the following list of claims" as the date "to file an *action in court*," and require submission of the "names of potential *plaintiffs* and *defendants*." *See* 54 Fed. Reg. 52,071 (Dec. 20, 1989); 55 Fed. Reg. 50,660 (Dec. 7, 1990); 56 Fed. Reg. 66,304 (Dec. 20, 1991); 57 Fed. Reg. 62,112 (Dec. 29, 1992) (corrected by 58 Fed. Reg. 17,042 (Mar. 31, 1993)); 59 Fed. Reg. 3,970 (Jan. 27, 1994) (emphasis added).

A. The Legislative History of FOGRMA Confirms that Congress Did Not Contemplate a Six-Year Statute of Limitations for Administrative Orders to Pay Royalties.

As a sovereign, the United States is subject only to the statutes of limitations that it imposes on itself by Act of Congress. *See Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1, *11 (1889); *United States v. Trio-No Enterprises, Inc.*, 819 F.2d 154, 158 (7th Cir. 1987); *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339 (5th Cir.), *cert. denied* 454 U.S. 1081 (1981); Pet. Br. at 3. While the 1966 Act imposed a general statute of limitations against the federal government on "actions for money damages" founded on contract, the question at issue here is whether this general limitation applies to the specific administrative orders for royalty payments issued by MMS in this case. This Court has often stated that a determination of the "meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citing *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)); *United States v. Fausto*, 484 U.S. 439, 453 (1988); *see also Scheidler v. N.O.W.*, ___ U.S. ___, 126 S. Ct. 1264, 1273 (2006) (a later, more specific statute aimed directly at the type of activity at issue suggested that the more general Hobbs Act did not apply). When Congress passed FOGRMA, it was clear that Congress did not view the six-year statute of limitations in Section 2415(a) as applying to the administrative collection of oil and gas royalties.

Congress enacted FOGRMA in 1983 in the wake of scandals involving massive underpayments of federal and Indian oil and gas royalties; as a consequence, FOGRMA was

intended to provide a more rigorous enforcement and oversight regime for royalty collection. *See* Section III.B, below; 30 U.S.C. § 1701. There is therefore no indication in the original FOGRMA of any intent to protect the oil and gas industry from administrative orders issued to collect underpaid royalties. When the Act was passed, the only statute of limitations in FOGRMA pertained to actions to recover *penalties*. *See* 30 U.S.C. § 1755.[8]

When deliberating the original FOGRMA legislation, moreover, Congress clearly did not act as if the six-year statute of limitations in Section 2415 applied to MMS orders such as the ones in this case. Discussing the record-keeping provisions in Section 103 of the statute (codified as 30 U.S.C. § 1713), the House Committee on Interior and Insular Affairs stated that "[t]he Committee intends that the Secretary will require that records be maintained beyond the 6-year [record retention] limit only for such period that he is diligently pursuing an audit." H.R. Rep. No. 97-859, at 18. An MMS order for payment of additional royalties follows an audit, as do any administrative appeals by the company or any other enforcement actions by the agency. *See, e.g.*, 30 C.F.R. parts 217, 218, 290 (2005). Thus, the Committee obviously

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[8] BP argues that a statute of limitations is important because MMS imposes interest on late payments, pursuant to 30 U.S.C. § 1721(a). That interest is not punitive, however, but simply accounts for the time value of money. The companies have had the use of the money during the entire period that royalties have gone unpaid. *Sanguine Ltd*, 155 IBLA 277, 283 (2001) ("late payment charges are not a penalty; they merely compensate the lessor for the time value of money owing but not timely paid, the use of which the lessee enjoys during the period the amount is unpaid"); *Stream Energy, Inc.*, 146 IBLA 130, 133 (1998); *Shell Offshore, Inc.*, 115 IBLA 205, 212 (1990); *Coastal Oil & Gas Corp.*, 108 IBLA 62, 67 (1989).

contemplated agency action to collect unpaid royalties well beyond six years.[9]

B. The Addition of an Express Seven-Year Statute of Limitations in RSFA for MMS Orders to Pay Royalties Supports the Interpretation that the General Six-Year Statute of Limitations in Section 2415(a) Does Not Apply to Them.

Fourteen years later, Congress demonstrated that if it wants to set a statute of limitations for MMS administrative orders, it knows how to do so. In 1996, Congress passed RSFA, an amendment to FOGRMA and the only legislation to specifically address the statute of limitations for administrative actions to collect royalties. RSFA provided a seven-year statute of limitations for the United States to seek additional royalties from oil and gas producers, RSFA § 4, 30 U.S.C. § 1724, and applied this deadline both to judicial claims and to "demands," which it defined to include MMS orders to pay royalties,

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[9] BP's complaint about onerous record-keeping is exaggerated. Under MMS regulations, the company must file reports of mineral production, price of minerals sold, and amount of royalty payments made, all of which are kept by MMS indefinitely and are available to the company. *See* 30 C.F.R. §§ 210.10, 210.50-.55, 216.50-.55 (describing required forms); 216.25 (availability) (2005). Moreover, the company is made aware if MMS is reviewing records as part of an audit, *see* 30 C.F.R. §§ 212.50-.51, and MMS allows the company time to produce records for inspection, *see, e.g.*, 30 C.F.R. § 212.51(c). The legislative history of FOGRMA confirms that Congress did not envision record-keeping as an onerous burden: "The committee intends that the Secretary will require that records be maintained beyond the 6-year limit only for such period that he is diligently pursuing an audit and will release the record holder of his obligation to maintain records at the earliest possible date." H.R. Rep. No. 97-859, at 29; *accord* 30 C.F.R. §§ 212.50-.51.

30 U.S.C. § 1702(23). Congress also made clear that this statute of limitations does not apply to MMS collection of royalties for Indian tribes. RSFA § 9, 30 U.S.C. § 1701 note ("The amendments made by this Act shall not apply with respect to Indian lands, and the provisions of [FOGRMA]. . . as in effect on the day before the date of enactment of this Act [Aug. 13, 1996] shall continue to apply after such date with respect to Indian lands.").[10]

The fact that Congress added to FOGRMA an express statute of limitations on royalty collection and made it clear that the statute applied to administrative orders, or "demands," as well as to judicial claims indicates that Congress in 1996 did not understand the general statute of limitations in Section 2415(a) to apply to MMS administrative orders under FOGRMA. Moreover, the fact that the RSFA statute of limitations is seven years rather than six indicates that Congress was not seeking to clarify Section 2415(a) but was creating an

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[10] RSFA also does not apply to other minerals, such as coal, or to geothermal resources. *See* RSFA §§ 2,4, 30 U.S.C. §§ 1702(25) and (28), 1712, 1724. Thus, although administrative orders to collect oil and gas royalties from federal lands are subject to the seven-year statute of limitations for oil and gas produced after August 1996, such orders regarding royalties for coal on federal lands, which bring in millions of dollars a year to the federal and state governments, are not. *See* 30 U.S.C. §§ 191, 207 (states receive 50% of revenues from "rentals of the public lands," including coal leases, within state boundaries); Minerals Revenue Management, Minerals Management Service, U.S. Dept. of Interior, Reported Royalty Revenue by Category (reporting revenues from American Indian coal royalties for 2003-2005 ranging from approximately $55 million to $100 million, and total revenues from coal royalties for 2003-2005 ranging from approximately $460 million to $540 million). *See* http://www.mrm.mms.gov/MRMWebStats (last visited July 31, 2006) (providing links to information regarding royalty revenues for gas, coal, oil, and other royalties from 2001 forward).

entirely *new* statute of limitations on administrative orders for royalty collection.

The RSFA legislative history lends support to this interpretation. The House Report on RSFA states that this "new Section 115 to FOGRMA" was "add[ed] to *establish* limitation periods," not to amend or alter them. H.R. Rep. No. 104-667, at 18 (1996) (emphasis added); *accord* 142 Cong. Rec. S9675-05, at S9676 (1996) (Senator Murkowski's introduction of the RSFA bill); *id.* at S9676 (Letter from Secretary of the Interior to Sen. Murkowski (Jun. 6, 1996)); 142 Cong. Rec. S8369-02 (1996) (introduction of the bill by Sen. Bingaman for final passage). The minority statement in the House report confirms that Congress did not believe that any prior statute of limitations applied to MMS orders. In lamenting the enactment of the new seven-year statute of limitations in RSFA, the minority states that "*[h]ad the statute of limitations been in effect*, [Interior] would have been unable [in 1996] to investigate" an alleged conspiracy in California "during the period of 1978 to 1993" that was then under investigation. H.R. Rep. No. 104-667 at 49 (emphasis added).

Moreover, since RSFA does not apply to Indian lands, applying Section 2415(a) to administrative orders would have the result, after September 1, 1996, of Section 2415(a) applying *only* to oil and gas produced from Indian lands and not to oil and gas produced from federal lands, which are subject to the RSFA statute of limitations. *See* 30 U.S.C. § 1724.[11] In other words, royalty orders for Indian lands would be subject to a six-year statute of limitations, whereas royalty orders for federal lands would be subject to a seven-year statute of limitations.

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[11] The seven-year statute of limitations in RSFA became effective on September 1, 1996, the "first day of the month following August 13, 1996." 30 U.S.C. § 1724 note; RSFA § 11, 30 U.S.C. § 1701 note.

Considering the long-standing federal trust responsibility to Indian tribes, it would not merely be a peculiar result for a *shorter* limitations period to apply to Indian lands, but it would in fact be antithetical to that trust relationship, since it would undercut the United States' heightened duty to enforce Indian leases. *See generally Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (United States has a "moral obligation[] of the highest responsibility and trust" to Indian tribes and the federal government's "conduct . . . in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., dissenting), *dissenting opinion adopted by court en banc*, 782 F.2d 855 (10th Cir. 1986), *modified*, 793 F. 2d 1171 (10th Cir. 1986), *cert. denied,* 479 U.S. 970 (1986) (holding that the Secretary is obligated to act as a fiduciary in the administration of tribal oil and gas reserves and therefore her "actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary"); *Pawnee v. United States,* 830 F.2d 187, 190 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) ("United States has a general fiduciary obligation toward the Indians with respect to the management of . . . oil and gas leases"); 30 U.S.C. § 1701 (referring to the Secretary's "trust responsibility in the administration of Indian oil and gas"); 30 C.F.R. § 206.170(e) (2005) (referring to "the trust responsibilities of the United States with respect to the administration of Indian oil and gas leases").

Congressional testimony regarding RSFA provides further evidence that, at the time of passage of RSFA, the parties understood that the Indian lands exemption would keep tribal lands from being burdened by a statute of limitations at all, and certainly would not subject tribal lands to a *shorter* limitations period than RSFA provides. In her testimony on the

proposed RSFA statute, the MMS Director – the head of the very agency tasked with royalty collection and enforcement – stated that the MMS "welcome[d] the fact that this bill would not apply to Indian leases, but . . . question[ed] why the Federal Government's obligation to the taxpayer for its oil and gas resources should be substantially *less than* it is to the Indian community for its oil and gas resources." *Clarification of Royalty Procedures: Before the House Subcommittee on Energy and Minerals Resources,* 1995 WL 435736 (July 18, 1995) (testimony of Cynthia Quarterman, Director, Minerals Management Service, Department of the Interior) (emphasis added). While the MMS Director's statement too readily dismisses the heightened federal trust responsibility toward tribes, it plainly evidences the general understanding at the time of RSFA's passage that exempting tribal lands from the statute would provide tribes with *additional* protections.

III. There is No Inherent Unfairness in the D.C. Circuit's Ruling.

A. When BP/Amoco Entered into the Leases at Issue there was No Statute of Limitations Against the United States, Neither Administrative Nor Judicial.

Amoco Production Company ("Amoco"), BP's predecessor in interest, "entered into leases with the Secretary of the Interior" approximately "a half-century ago." Pet. Br. at 7. At that time, according to BP's own brief in this case, "there was no general statute of limitations governing actions *by the United States* against private parties for breach of [contract]." *Id.* (emphasis in original). Such suits "ordinarily were governed by the rule *quod nullum tempus occurit regi* – 'no time shall run against the King' – and the United States had an

infinite amount of time within which to seek recovery." *Id.* This was the state of the law and thus part of the bargain Amoco knowingly struck when it entered into the leases which are now the subject of this case. Without expecting repose of any sort for liability for potential royalty miscalculations, intentional or otherwise, Amoco entered into a consensual lease relationship with the United States to extract and reap the financial benefits of 7/8 of the oil and gas production on tracts leased in the San Juan Basin.[12]

It is for Congress to determine when and whether a limitations period in the context of oil and gas royalty enforcement is in the national interest. The plainest, most straightforward reading of Section 2415 and the express statute of limitations in RSFA show that Congress simply did not act in the area of MMS orders to pay royalties until 1996, at which point Congress specifically provided a seven-year limitation on the United States for such administrative orders, expressly excluding solid minerals and Indian lands.

The fact that Congress waited until 1996 to provide a statute of limitations on MMS orders to pay royalties does not create anomalies in the law that this Court must fill through judicial construction. On the contrary, it is commonplace for Congress to choose to legislate on *some* matters in a particular field without addressing *all* matters in that field. *See, e.g.,*

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[12] Oil and gas companies enter into standard leases on federal and Indian lands in which they historically have received a right to 7/8 or 5/6 of the production. Thus, the lessees' obligation is to pay a royalty of only 1/8 or 1/6, based on the "fair market value" of the production. The leases also provide that the fair market value is subject to regulations in effect or to be put in effect by the government. Under Amoco's (now BP's) leases, the company obtained the right to 7/8 of the value of the mineral production. Pet. Br. at 7.

Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000):

> [W]e should not be quick to conclude that Congress either neglected to consider an issue related to its enactments, or decided to avoid the issue and leave its resolution to the courts. Such a predisposition on our part makes for activist judges and lazy Congressmen. Instead, we should search the statutory language and structure *with the assumption that Congress knew what it was doing* when it enacted the statute at issue.

Id. at 936 (emphasis added); *see also United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991) ("not every congressional silence is pregnant"); *Ohio Nat'l Bank v. Berlin*, 26 App. D.C. 218, 1905 WL 17656, at *3 (C.A.D.C. 1905) (it is not for the court to read legislation to embrace some cases only because a party argues that there is no good reason why those cases were excluded); *United States v. Union Pacific R. Co.*, 91 U.S. 72, 86 (1875) (the court "cannot supply omissions in legislation nor afford relief because [omissions] are supposed to exist."). There is nothing inherently unfair about Congress acting to provide limited repose to an existing consensual relationship in 1996 rather than 1966, particularly when one considers the history of royalty underpayment by oil and gas companies.

B. The 50-Year History of Industry Underpayment of Federal and Indian Oil and Gas Royalties Demonstrates that Congress Intended No Broad Repose from MMS Orders to Pay Royalties until 1996.

BP makes much of the general purpose of repose underlying statutes of limitations, and attempts to apply that

principle to explain what Congress *should have done* in crafting Section 2415(a). However, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993)). The general societal benefit of establishing a period of repose in certain circumstances cannot trump the wording of Section 2415(a) or be allowed to undermine the important societal benefit that Congress intended by demanding proper enforcement and collection of royalties.

A statute cannot be "divorced from the circumstances existing at the time it was passed." *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951). During the 1960's and 1970's – including the very time that Congress was debating the passage of Section 2415 – the oil and gas industry was embroiled in a national scandal involving the theft of federal and Indian mineral resources by third parties and the underreporting of federal and Indian oil and gas royalties by hundreds of millions of dollars each year. In 1981, in response to these disturbing allegations, James Watt, the Secretary of the Interior during the Reagan administration, created a commission to investigate whether oil and gas companies were failing to report and pay royalty revenues properly: the so-called Linowes Commission. *See generally* Report of the Commission, Fiscal Accountability of the Nation's Energy Resources (Jan. 1982) ("Linowes Commission Report") (selected portions at Amicus App. 1a-7a).

The Linowes Commission was established to investigate "serious allegations of massive irregularities in royalty payments due the Federal government, Indian tribes, and States." *Id.* at 1a. The Linowes Commission determined that there were in fact "massive irregularities" in the calculation

of royalty revenues, costing States, Indian tribes, and U.S. taxpayers "hundreds of millions of dollars" in unpaid royalties:

> Management of royalties for the Nation's energy resources has been a failure for more than 20 years. Because the Federal government has not adequately managed this multibillion dollar enterprise, the oil and gas industry is not paying all the royalties it rightly owes . . . . The results of individual audits, which have often uncovered large underpayments, suggest that hundreds of millions of dollars due the U.S. Treasury, the States, and Indian tribes are going uncollected every year.

Id. at 3a. The Commission concluded that "undervaluation of natural gas was the largest factor in royalty underpayments," and that this problem was due in large part to the fact that the federal government "routinely accepts oil and gas companies' valuation of the product on which royalties are paid." *Id.* at 4a; *see also id.* at 7a (detailing one example of a company that underpaid more than $2 million from 1966 to 1976).

Decades of industry underpayments of hundreds of millions of dollars in federal and Indian royalties led Congress to enact FOGRMA, to "reaffirm, clarify and expand" the Secretary's authority to determine and collect the full amount of oil and gas royalties due under Federal and Indian leases. 30 U.S.C. § 1701(b)(1). FOGRMA's drafters explained that "States and Indian landowners have an important stake in the full and correct payment of royalties." H. Rep. No. 97-859, at 15. In particular, FOGRMA declares that "the Secretary should aggressively carry out his trust responsibility in the administration of Indian oil and gas." 30 U.S.C. § 1701(a)(4).

BP and supporting *amici* portray the oil and gas industry as the victim of a capricious federal bureaucracy. But the industry is not a victim, and it is not the federal government at fault here but the oil companies themselves.[13] Too often, states, tribes, and taxpayers have been denied their rightful royalty payments through oil and gas industry accounting schemes designed to reduce payments and inflate cost "allowances." *See United States v. Chevron U.S.A., Inc.*, 186 F.3d 644 (5th Cir. 1999); *United States ex rel. Koch v. Koch Indus., Inc.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999) (detailing numerous federal investigations and lawsuits seeking to disgorge improper oil company profits made through schemes to undervalue oil and gas production); *accord United States ex rel. Johnson v. Shell Oil Co.*, 33 F. Supp. 2d 528, 534-40 (E.D. Tex. 1999).

Other False Claims Act lawsuits filed by industry whistle-blowers are still pending in the courts, providing evidence that some in the oil and gas industry continue intentionally to underreport royalties. These lawsuits explain how lessees undervalue gas using a variety of schemes, including by calculating royalties based on sales to affiliates instead of arm's-length transactions; deducting more than the actual costs incurred for transportation and processing services; and undermeasuring and undervaluing gas and natural gas liquids. *See, e.g., United States ex rel Harrold E. (Gene) Wright v. AGIP Petroleum Co.*, No. 9:98CV30 (E.D. Tex. filed February 3, 1998), transferred No. 5:03-CV-264 (E.D. Tex.); *In*

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[13] BP continues to argue that it acted in compliance with the existing law regarding royalty calculation, even after the D.C. Circuit found otherwise and this Court denied certiorari on that point. *See* Pet. Br. at 7 ("Consistent with 60 years of Department of Interior and [MMS] practice, Amoco calculated the royalty as a percentage of the value of production . . . from the lease by determining the value of the gas as produced at the wells") (internal quotations omitted). The law of the case is directly to the contrary of BP's assertion. 410 F.3d at 727-730.

re Natural Gas Royalties Qui Tam Litigation, No. 1:99-md-01293-WFD (D. Wyo. filed Oct. 22, 1999) (consolidating 66 actions in eight districts). MMS has also specifically identified such unlawful practices. *See, e.g., Union Texas Petroleum*, 153 IBLA 170, 172 (2000) (failure to perform dual accounting;[14] failure to use accurate volumes and Btu measurements; undervaluation of gas by using contract price instead of maximum lawful price; taking processing allowance greater than actual cost); *Marathon Oil Co.*, 149 IBLA 287, 292-93 (1999) (failure to dual account); *ARCO*, 131 IBLA 299, 304 (1994) (undervaluation of production due to mis-categorization of oil); *Amoco Production Co.*, 123 IBLA 278, 293 (1992) (repeated royalty underpayments caused by erroneous claims for refunds).

Given this indisputable history, the general principle of repose underlying statutes of limitations, as invoked by BP, is merely a "vague notion[] of a statute's basic purpose," *cf. Great-West Life*, 534 U.S. at 220, misplaced in the context of MMS royalty collection efforts. Only in 1996, with the passage of RSFA, did Congress provide repose to federal lessees from administrative orders to collect royalties for periods longer than seven years. *See* Section II.B, *supra*.

C. The Self-Reporting of Royalties by Oil and Gas Companies Instructs Against Implied Repose.

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[14] Dual accounting is a valuation method required in Indian leases. The lessee must calculate both (1) the value of the unprocessed gas and (2) the combined values of the processed gas and separated liquids after processing (less allowed processing costs), and pay royalties as a percentage of the higher of the two values. 30 C.F.R. § 206.155 (1988); *see also* 30 C.F.R. § 206.171 (2005).

Oil and gas companies make royalty payments to MMS based on *their own* reports of the volume and the value of their production, including their own sales to different units of the same company. *See, e.g.*, 30 C.F.R. part 210 (2005). MMS cannot be assured of the accuracy of these reports without conducting audits, *see generally* 30 U.S.C. §§ 1701, 1711; 30 C.F.R. §§ 217.50 - 217.52 (2005), which often are complex and time-consuming. Thus the companies are in full possession of all the facts concerning the amount of royalties due, whereas MMS must review production reports, sales data, company affiliations, transportation and processing costs, and other information before it can determine the amount of royalties actually due and issue an order to that effect. *See Union Texas Petroleum*, 153 IBLA at 179; *BHP Petroleum (Americas) Inc.*, 124 IBLA 185, 187-88 (1992) (cases describing the audit process).

Indeed, in enacting FOGRMA, Congress found that the oil and gas industry has operated "essentially on an honor system," without sufficient verification of industry reporting. H.R. Rep. No. 97-859, at 15. A fundamental purpose of FOGRMA was to ensure collection of the proper amount of royalties, not to protect lessees against claims for royalty payments that are still owing because of the lessees' initial underreporting and underpayment. 30 U.S.C. §§ 1701 (purposes), 1711 (directing Interior to establish, *inter alia*, "a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties . . . and to collect and account for such amounts in a timely manner"); *see also Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1013 (10th Cir. 2001) (Brisco, J., dissenting). Tellingly, as stated previously, *supra* at note 6, the only statute of limitations in FOGRMA when it was enacted pertained to actions to recover *penalties* under the Act. 30 U.S.C. § 1755.

These facts point to the need not for a stricter period of repose but, on the contrary, for allowing the government sufficient time to perform the necessary audits. The audit process, including the required notice to the company and opportunity to respond, *see, e.g.*, 30 C.F.R. § 217.50, is necessarily retroactive and requires a sufficient amount of time to determine whether back-royalties are due to the federal government or tribal lessors. Such detailed determinations, together with the demand for additional payment and the oil companies' administrative appeals, may take more than six years to complete, as they did in this case. *See* Pet. Br. at 8.

IV. The D.C. Circuit's Interpretation of Section 2415(a) is Consistent with the Purposes of MMS Oversight and Avoids Unnecessary and Inefficient Litigation.

MMS has not always fulfilled its intended role of aggressive and effective royalty oversight. *See, e.g.*, Final Report on an Audit of the Minerals Management Service Audit Offices, OIG 2003-I-0023 (Mar. 31, 2003).[15] Nonetheless, states and tribes rely on MMS's authority in royalty enforcement and collection. *See generally* 30 U.S.C. §§ 1711, 1751(a); 30 C.F.R. § 201.100; *Shoshone Indian Tribe v. United States*, 58 Fed. Cl. 77, 82 (2003) (noting the Secretary's royalty collection and enforcement obligations under FOGRMA). States and tribes have taken advantage, for example, of their explicit ability under FOGRMA to identify to MMS certain leases or companies for audit, as the State of New Mexico did in the instant case. *See* 30 U.S.C. §§ 1711(c), 1732, 1735; Pet. Br. at 8. Tribes in particular, with generally fewer resources than the states, rely on MMS to perform its royalty enforcement

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[15] Available at http://www.doioig.gov.

duty consistent with the United States' trust responsibility, and both tribes and states rely on the MMS's general duty "to obtain for the public a reasonable financial return on assets that 'belong' to the public" in its role as "the statutory guardian of [the] public interest." *California Co. v. Udall*, 296 F.2d 384, 387-88 (D.C. Cir. 1961).[16]

An MMS order for additional royalty payment is one step in the process of MMS royalty enforcement. Oil- and gas-producing companies must fill out regular production and

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[16] Royalties from mineral production are one of the major sources of government revenues. *See, e.g.*, Final Report on an Audit of the Minerals Management Service Audit Offices, OIG 2003-I-0023 (March 31, 2003), at 1, available at http://www.doioig.gov ("MMS collects about $6 billion annually in rents, royalties, and other payments"); *see also* H.R. Rep. No. 106-1053, at 296-300 (2001) (recognizing that "[r]oyalties from oil and gas leases on Federal lands are one of the largest sources of non-tax revenues for the Federal Government;" that "[a]ccording to the [MMS], since 1982, nearly $100 billion has been disbursed from Federal onshore and offshore leases;" that in 1998 "the Royalty Management Program generated nearly $6 billion from more than 26,000 mineral leases," and "[o]f that amount, $550 million was distributed to the States and used for schools, roads, and public buildings;" and therefore concluding that "Congressional oversight into the management of this program. . . [is] essential to ensure a fair return to the American taxpayer" and that "[o]versight of the [DOI's] management of the valuation, collection and distribution of royalties from leases on tribal lands is also essential to ensure that the Federal Government is meeting its fiduciary responsibility as trust manager for the beneficiaries of these royalties"); H.R. Rep. No. 104-667, at 46-47 (stating that Congress enacted FOGRMA to "tighten[] the government's grip on hundreds of millions of dollars in revenue previously lost or stolen;" recognizing that "[a]ccording to the bipartisan Linowes Commission in its 1981 report, the program was losing between $200 million and $500 million annually due to theft and royalty underpayments by federal lessees;" finding that "[t]oday [1996] the program raises close to five billion dollars annually and has raised a total of $81 billion since 1982, including more than $1.5 billion in underpayments;" and concluding that "[o]nly taxes and customs raise more revenues for the U.S. Treasury").

royalty forms and submit these to MMS. *See* 30 C.F.R. §§ 210.10, 210.50-.55, 216.50-55. Based on these submissions, as well as information from states or tribes, MMS may require additional reports or subject certain leases or companies to an audit, with full notice. 30 C.F.R. §§ 210.55, 217.50. MMS may issue a Notice of Noncompliance with statutory, regulatory, or lease provisions, allowing time for correction or a hearing before assessing penalties. 30 C.F.R. §§ 241.51-.56. (2005). MMS may also issue an order for payment, as it did in this case, which is also subject to appeal. 30 C.F.R. §§ 290.102, 290.103 (2005). During this process, there is constant interaction with the oil or gas company. In the instant case, for example, an "Issue letter" was sent to Amoco on November 16, 1995, identifying under-reporting problems which affected the royalty due. J.A. at 512 (*Amoco Production Co. v. Baca*, Nos. 00-02933, 00-01480 (D.D.C.)). Further information and documentation was requested from Amoco on May 20, 1996. *Id.* at 515. MMS issued its order for additional royalties on May 27, 1997. Pet. Br. at 8. Amoco appealed administratively under 30 C.F.R. part 290. Pet. Br. at 9. Amoco then filed suit in federal court only after obtaining an unfavorable decision on appeal to the Assistant Secretary. *Id.*[17]

Due to the tribal exemption in RSFA, applying the six-year statute of limitations to MMS orders to pay royalties would upset this administrative scheme for tribes in particular,

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[17] In this case, the State of New Mexico exercised its option under FOGRMA to carry out MMS investigation and audit tasks on its own. 30 U.S.C. §§ 1732, 1735. MMS also may delegate to states the authority to issue orders to pay royalties, pursuant to 30 U.S.C. § 1734, although it has never done so. Regardless, some states and tribes may not wish or may not be able to step into the shoes of MMS pursuant to these FOGRMA provisions, and MMS ultimately is responsible for enforcement, *see generally* 30 U.S.C. § 1711, 30 C.F.R. § 229.100(b) (2005), and for administrative reviews, 30 C.F.R. part 290.

virtually eliminating a major avenue of recourse for tribes to recover royalty underpayments without going to court. If tribes could not rely on the sometimes lengthy MMS procedure, this would impose on tribes extensive auditing and fact-finding duties, as opposed to Congress' intended system through FOGRMA, in which tribes and states have the *option* of pursuing their own investigations and audits and then submitting these to MMS for enforcement. *See, e.g.*, 30 U.S.C. §§ 1732, 1735. This result not only would be unjust to the tribes who rely on MMS to carry out its fiduciary duties, but also would be contrary to the purposes of FOGRMA and the trust obligations it imposes on MMS.

Moreover, if the six-year statute of limitations in Section 2415 applied to MMS audit procedures, tribes would be forced to file otherwise unnecessary or premature claims in court to preserve their rights to royalties rather than wait for a final MMS royalty order, since the process which results in an MMS order could take more than six years. Finally, a holding that Section 2415 applies to MMS orders would encourage breach of trust lawsuits *against* the United States for failure to timely initiate collections.[18]

CONCLUSION

The Court should uphold the decision of the U.S. Court of Appeals for the D.C. Circuit.

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[18] With the enactment of FOGRMA, Congress exhorted MMS to fulfill its trust obligations to administer oil and gas royalties, *see, e.g.*, 30 U.S.C. § 1701, and "beneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees," *Wolfchild v. United States*, 62 Fed. Cl. 521, 547 (2004) (quoting *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004), *cert. denied* 554 U.S. 973 (2005)).

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